

CHARLES R. MESSER (State Bar No. 101094)  
 messerc@cmtlaw.com  
 DAVID J. KAMINSKI (State Bar No. 128059)  
 kaminskid@cmtlaw.com  
 CARLSON & MESSER LLP  
 5959 W. Century Boulevard, Suite 1214  
 Los Angeles, California 90045  
 (310) 242-2200 Telephone  
 (310) 242-2222 Facsimile  
 kaminskid@cmtlaw.com  
 Attorneys for Defendants,  
 ERICA L. BRACHFELD and ERICA L. BRACHFELD,  
 A.P.C. erroneously sued as LAW OFFICES OF  
 BRACHFELD & ASSOCIATES, P.C.

UNITED STATES DISTRICT COURT  
 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

MERCY MESIANO,	)	CASE NO. 09 CV 1046 MMA BLM
	)	
Plaintiff,	)	<b>EX PARTE APPLICATION FOR</b>
	)	<b>PERMISSION FOR TELEPHONIC</b>
vs.	)	<b>APPEARANCE BY DAVID AFTON</b>
	)	<b>(INSURER REPRESENTATIVE);</b>
ERICA L. BRACHFELD AND	)	<b>DECLARATIONS OF CHARLES R.</b>
LAW OFFICES OF BRACHFELD	)	<b>MESSER AND DAVID S. AFTON;</b>
& ASSOCIATES, P.C.	)	<b>[PROPOSED] ORDER</b>
	)	
Defendants.	)	<b>Date: August 12, 2009</b>
	)	<b>Time: 1:30 p.m.</b>
	)	<b>Dept.: 5</b>
	)	<b>Magistrate Judge: Barbara L. Major</b>

Defendants ERICA L. BRACHFELD and ERICA L. BRACHFELD, A.P.C.  
 ("Defendants") hereby apply to this Court for an *Ex Parte* Order to permit the  
 Defendants' insurer's representative with authority to settle the action (Mr. David  
 S. Afton) to appear by telephone at the Early Neutral Evaluation Conference  
 scheduled for August 12, 2009 at 1:30 p.m. in the chambers of the United States  
 Magistrate Judge Barbara L. Mayor, Courtroom 5, 940 Front Street, San Diego,  
 California.

This application is made on the ground that Defendants' corporate

1 representative (Martin Brachfeld) will personally attend the ENE, and on the ground  
 2 that the Defendants' insurance adjustor (David S. Afton, Senior Claim Specialist,  
 3 First Mercury Insurance Company, Southfield, Michigan 48034) sustained physical  
 4 injuries to his left knee on June 21, 2009, and that his on-going physical therapy and  
 5 his current condition preclude him from traveling at the present time. Mr. Afton  
 6 will be available during the ENE Conference by telephone.

7 Defendant has discussed these issues with plaintiff's counsel Joshua Swigert.  
 8 Mr. Swigert has no objection to, and he will not oppose, this Ex Parte Application.

9 This Application is further based on the attached Memorandum of Points and  
 10 Authorities and Declarations of Charles R. Messer and of David Afton, upon the  
 11 court's file, and upon any other matters that the court may deem just and proper.

12  
 13 DATED: July 30, 2009

CARLSON & MESSER LLP

14  
 15 By /s/ Charles R. Messer  
 16 Charles R. Messer  
 17 David J. Kaminski  
 18 CARLSON & MESSER LLP  
 19 Attorneys for Defendants,  
 20 ERICA L. BRACHFELD and ERICA  
 21 L. BRACHFELD, A.P.C. erroneously  
 22 sued as LAW OFFICES OF  
 23 BRACHFELD & ASSOCIATES, P.C.  
 24  
 25  
 26  
 27  
 28

1 MEMORANDUM OF POINTS AND AUTHORITIES

2  
3 I.  
INTRODUCTION

4 The Defendants are insured in this FDCPA case by First Mercury Insurance  
5 Company ("First Mercury"). First Mercury is defending this case under a  
6 reservation of rights, and the Defendants have a deductible.

7 First Mercury assigned this case to Senior Claim Specialist David S. Afton  
8 for handling. First Mercury does not have any offices in California.

9 Mr. Afton sustained physical injuries to his left knee on June 21, 2009. In  
10 an effort to avoid surgery, he is currently undergoing physical therapy. Mr.  
11 Afton is physically unable to travel at the present time. He would like to attend  
12 the August 12, 2009 ENE Conference by telephone.

13 The Defendant's corporate representative Martin Brachfeld plans to  
14 personally attend the August 12, 2009 ENE Conference.

15 The above-issues have all been discussed with plaintiff's counsel Joshua  
16 Swigert. Plaintiff has no objection to, and plans not to oppose, this Application.

17 Pursuant to the foregoing, the Defendants respectfully requests that this *Ex*  
18 *Parte* Application be granted, and that Mr. Afton be permitted to participate in the  
19 August 12, 2009 ENE Conference by telephone.

20  
21 DATED: July 28, 2009

CARLSON & MESSER LLP

22  
23 By /s/ Charles R. Messer  
24 Charles R. Messer  
25 David J. Kaminski  
26 Attorneys for Defendants,  
27 ERICA L. BRACHFELD, A.P.C. and  
28 ERICA L. BRACHFELD

**DECLARATION OF CHARLES R. MESSER**

I, Charles R. Messer declare:

1. I am an attorney at law who is licensed and admitted to practice law before all state and federal courts within the State of California. I am a partner with the law firm of Carlson & Messer LLP, attorneys of record for Defendants ERICA L. BRACHFELD and ERICA L. BRACHFLED, A.P.C. in this case. I have personal knowledge of the facts set forth in this declaration and, if called and sworn as a witness, I could and would competently and truthfully testify to these facts.
2. On July 29, 2009, I called plaintiff's counsel Joshua Swigert. I left a message on his voice-mail, that the Defendant's corporate representative (Mr. Martin Brachfeld) plans to personally attend the August 12, 2009 ENE Conference, but that the Defendants' insurance representative (Mr. David Afton) lives and works in Michigan, and that he recently sustained knee injuries which make him unable to travel. I told Mr. Swigert that Mr. Afton could attend the Conference by telephone. I asked whether the plaintiff would oppose a request to excuse Mr. Afton's personal attendance from the August 12, 2009 Conference.
3. On July 30, 2009 at 7:59 a.m., Mr. Swigert left a voice-mail message for me. He advised that he is in Chicago taking depositions. He said that he listened to my July 29, 2009 voice-mail message, and that the plaintiff will not oppose this Application.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 30th day of July 2009 at Los Angeles, California.



Charles R. Messer, Declarant

**DECLARATION OF DAVID S. AFTON**

I, David S. Afton, declare:

1. I am employed by First Mercury Insurance Company as a Senior Claim Specialist. I live in Michigan, and my office is located at First Mercury's offices in Southfield, Michigan. I have personal knowledge of the facts set forth in this declaration and, if called and sworn as a witness, I could and would competently and truthfully testify to these facts.
2. First Mercury does not maintain any offices within the State of California. First Mercury assigned this case (MERCY MESIANO v. ERICA L. BRACHFLED, A.P.C.) to me for handling. I am authorized to negotiate settlements that exceed the policy-holder's deductible.
3. On June 21, 2009, I sustained physical injuries to my left knee. I am currently undergoing physical therapy to rehabilitate my left knee, which is an effort to avoid surgery. Because of pain and discomfort, and because of on-going physical therapy, I am currently unable to travel long distances (such as a plane-ride to California).
4. I would like to attend the August 12, 2009 Early Neutral Evaluation Conference by telephone.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 29th day of July 2009 at Southfield, Michigan.

  
David S. Afton, Declarant